81-6156

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. _____

BILLY WAYNE WHITE

Petitioner

Versus

THE STATE OF TEXAS

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

ATTORNEY FOR PETITIONER:

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QUESTION PRESENTED

Whether the rule in Witherspoon v. Illinois, 391 U. S. 510 (1958), was violated by the exclusion for cause of a prospective juror during voir dire examination, without allowing counsel for petitioner to ask any questions whatsoever, after the prospective juror, in response to questions asked by the trial judge, stated that she had not thought about the death penalty, had no specific objections to it, could follow the law and write a death penalty in a proper case and could imagine a far out case in which a person should receive the death penalty and, then, further stated "I guess", "I feel" and "I don't think" that I could write the death penalty.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth, Eight and Fourteenth Amendments to the constitution of the United States.

2. This case also involves the following provisions of Texas Law:

Texas Penal Code S12.31. Capital Felony.

(a) An individual adjudged guilty of a capital felony shall be punished by confinement in the Texas Department of Corrections for life or by death.

(b) Prospective jurors shall be informed that a sentence of life imprisonment or death is mandatory on conviction of a capital felony. A prospective juror shall be disqualified from serving as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact.

Texas Code of Criminal Procedure Article 37.01(b) Procedures in Capital Case.

(a) Upon a finding that the defendant is guilty of a capital offense, the Court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial Court before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the Court deems relevant to sentence. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(b) On conclusion of the presentation of the evidence, the Court shall submit the following issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuation, if any, by the deceased.

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted.

(d) The Court shall charge the jury that:

(1) it may not answer any issue "yes" unless it agrees unanimously; and

(2) it may not answer any issue "no" unless 10 or more jurors agree.

(e) If the jury returns an affirmative finding on each issue submitted under this article, the Court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted under this article, the Court shall sentence the defendant to confinement in the Texas Department of Corrections for life.

(f) The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals with 60 days after certification by the sentencing Court of the entire record unless time is extended an additional period not exceeding 30 days by the Court of Criminal Appeals for good cause shown. Such review by the Court of Criminal Appeals shall have priority over all other cases, and shall be heard in accordance with rules promulgated by the Court of Criminal Appeals.

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Petitioner,

Versus

THE STATE OF TEXAS

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

Petitioner prays that a writ of certiorari issue to review the judgement of the Court of Criminal Appeals of the State of Texas, entered September 23, 1981, rehearing denied November 4, 1981.

CITATIONS TO OPINION BELOW

The opinion of the Texas Court of Criminal Appeals is reported at ____ S. W. 2nd _____ and attached as Appendix A.

JURISDICTION

Jurisdiction of this Court is invoked under 28 W.S.C. Sec. 1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

STATEMENT

On complaint filed August 24, 1976, the Grand jury of Harris County, Texas, indicted Billy Wayne White, on August 26, 1976 for Capital Murder, alleging that, on or about August 23, 1976, he did intentionally cause the death of Martha Laura Spinks, by shooting her with a gun in the course of committing robbery against her.

After a trial by jury in the 176th District Court of Harris County, Texas which began on October 3, 1977, petitioner was convicted of capital murder and sentenced to death. The constitutional question now presented arises from the selection of the jury pertaining to the exclusion of the venire member, Barbara Jean Grace for cause on motion of the prosecution.

Upon presentment of the prospective juror, Grace, the Court, prior to any questioning or statements by counsel for the State or defense, proceeded to explain various laws to the prospective juror and questioned her regarding the death penalty. She, at first, answered affirmatively seven times, for the death penalty including such answers as having no specific objections to it, could follow the law and write a death penalty in a proper case and could imagine a far out case in which a petitioner should receive the death penalty. Upon further questioning by the Court, she expressed doubts about the death penalty and in one instance said she could not Write a death penalty. The prosecutor moved to excuse the juror, citing Article 1231 (b), Code of Criminal Procedure. The petitioner stated that he objected to the prospective juror being excused unless further question would be allowed by the defense. The Court excused the prospective juror without allowing the defense to ask any questions whatsoever.

In each and every instance in which she expressed negative thoughts and feelings about the death penalty, she used the works, "I guess" - "I feel" - "I think" or "I don't think" except in the one instance in which she stated, "Right". Now, I have to say no." In this particular instance she was asked if she could write a verdict that would represent the death penalty, after which she was asked to explain her answer and said, "No, I just could not do it. I just don't think I could."

The complete transcript of the questioning of Barbara Jean Grace is annexed as Appendix B. The relevant excerpts are the following:

QUESTIONING OF BARBARA JEAN GRACE, PAGE 261

JUDGE: "..... is there anything that would keep you, if you thought that it as proper, that would keep you from writing a verdict, finding an individual guilty and assessing the death penalty."

ANSWER: "No, I don't think so. I don't have any specific reasons right now."

JUDGE: "I didn't hear you."

ANSWER: "I can't think of any right now."

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JUDGE: "..... can you consider, in a proper case, death as a proper penalty?"

ANSWER: "Well, I guess I could, but I don't know if I would want to make that decision or not...."

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JUDGE: "....how do your feel about the death penalty?"

ANSWER: "Well, I never really though about it."

JUDGE: "Well you've reached a point where you have to think about it."

ANSWER: "I just don't think I want to give anybody death. I don't think I could."

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JUDGE: "How do you feel about the death penalty?"

ANSWER: "Well, I guess I'd have to go along with it if..."

JUDGE: "If you found a petitioner guilty?"

ANSWER: "If it's the law, I guess I'd have to go along with it."

JUDGE: "You feel that you could shoulder your responsibilities?"

ANSWER: "Yes, I feel that I could; but, it would still be a hard decision even at that time, you know."

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JUDGE: ".....could you assume that responsibility if you thought that it was proper and would write a death penalty?"

ANSWER: "Yes, I guess I could, but..."

JUDGE: "Now, see, you say you guess. "Well, you're not saying that under no circumstances would you ever consider the death penalty, are you? You can imagine a far out case in which the death penalty, if the law provides it, that a person should receive it, can you not?"

ANSWER: "Yes, I can imagine that."

JUDGE: "And if you reach that point to where somebody gave you that type of case, the evidence was there and you felt beyond a reasonable doubt that that was a proper verdict, could you and would you write that verdict?"

ANSWER: "I'm going to have to say no."

JUDGE: "Well, you're the only one that knows. Can you tell us why you would not?"

ANSWER: "Well, it's just that even though I know that, you know, death would be the proper verdict and everything, it just seems like in my heart I wouldn't be able to do that, I just couldn't. I just don't feel that I

could just say death to this person."

JUDGE: "You understand, of course, you would not be saying death. You would be writing the answers that you know would mean that the judge would be the one that would be sentencing the person to death. You understand that?"

ANSWER: "Uh-huh."

JUDGE: "And you would answer those questions so that the judge would not be forced to give the individual death; is that what you're saying?"

ANSWER: "Right. At least I would not give him death. So, therefore, I would want the judge to not give him death also."

JUDGE: "Consequently, you would make your answers so that he could not receive death as a penalty; is that right?"

ANSWER: "Yes, sir. Even though I know what's right, I know what you're saying, you know; but deep in my heart, I just don't feel like I could write death to a person. So, therefore, I would want the judge to consider not giving death to him."

JUDGE: "Well, Miss Grace, of course there's nobody that can find any fault with how you feel. You're the one that has to make that decision. I told you yesterday we would find no fault with you, didn't I?"

ANSWER: "Yes, sir."

JUDGE: "Nobody is going to find any fault. All we need to know, are you so precommitted that regardless of how right you thought it was you would never write a verdict that would represent the death penalty?"

ANSWER: "Right. Now, I have to say no."

JUDGE: "When you say no, explain that."

ANSWER: "No, I just could not do it. I just don't think I could."

"MR. URQUHART: I would make a motion, Your honor. I believe that the lady is being honest with the Court."

"MR. PEAVY: I'd like to ask her just a few questions, Your Honor."

"MR. URQUHART: Regardless of what she says now, I mean the record is clear at this point."

"MR. PEAVY: Just maybe the Court could ask her if there's any conceivable situation, such as a far-out situation like a terrorist or mafia member who was threatening everybody in the courtroom -- the question is whether there is some situation that she would consider the death penalty."

QUESTION: (By the Court) "I gather from what you tell me that there are no circumstances, are there, that you would ever consider the death penalty, or am I wrong?"

ANSWER: "No. Huh-uh. Even if it was a terrorist or something, I would still feel that in my heart, you know, that the judge would give some other penalty besides death. I just don't feel like I could do it."

"MR. URQUHART: I renew my motion."

"MR PEAVY: You Honor, we object to the witness being, the juror, prospective juror, being excused unless we have the opportunity to question her a little more thoroughly."

"THE COURT: Doesn't the statute make a provision? Is the Court limited after she has --"

"MR URQUHART: That's what I'm trying to say. Whatever he can get her to say now, the record is clear at this point how she feels."

"MR. PEAVY: Your Honor, I feel that I have a right to question a juror myself on behalf of the defendant."

"THE COURT: Get me the statute. I think the statue provides that after she has committed herself that the Court has no further right to question her or that either side does. Do you have the statute there?"

"MR. URQUHART: Judge, now there may be something in the Code of Criminal Procedure. I have 1231

(b): 'The judge must excuse the juror.'"

"THE COURT: All right. Thank you, ma'am. You will be excused. ***"

The jury ultimately selected convicted petitioner and sentenced him to die. Petitioner's challenge on appeal to the constitutionality of the exclusion for cause of venire member Grace was rejected by the Texas Court of Appeals, and this conviction and death sentence were affirmed.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

In his brief before the Texas Court of Criminal Appeals and his rehearing application addressed to that Court, petitioner contended that the exclusion for cause of prospective juror Grace had violated his right to a fair trial under the Due Process Clause of the Fourteenth Amendment as interpreted by this Court in Witherspoon v. Illinois, 391 U.S. 510 (1968). The Court of Criminal Appeals rejected this contention in affirming his conviction and sentence and denying rehearing.

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE RULE OF WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968), WAS VIOLATED BY THE EXCLUSION FOR CAUSE OF A PROSPECTIVE JUROR, WITHOUT ALLOWING COUNSEL FOR THE DEFENSE TO ASK ANY QUESTIONS WHATSOEVER, WHO HAD ANSWERED THAT SHE HAD NO SPECIFIC OBJECTIONS TO THE DEATH PENALTY, COULD FOLLOW THE LAW AND COULD ALSO IMAGINE A CASE IN WHICH DEATH WOULD BE A PROPER VERDICT: FURTHER STATING THAT SHE DID NOT THINK OR FEEL THAT SHE COULD WRITE A DEATH PENALTY VERDICT.

At Petitioner's trial, a venire member was excluded for cause in clear violation of this Court's decision in Witherspoon v. Illinois, 391 U.S. 510 (1968). In fact, the prospective juror stated positively and affirmatively, to the effect that although she had not really thought about it, she had no specific reasons to oppose the death penalty and could follow the law and write a death penalty in a proper case. Upon further questioning by the Court, the prospective juror began to express opposition to the death penalty by answering "no" when asked if she could write a death penalty verdict; however in each and every instance of negative answers the prospective juror qualified and or explained her answer by making remarks such as, "I just don't think I could" and her final answer before being excused, "I just don't feel like I could do it."

At this juncture the prosecutor made a motion to excuse the juror in reference to Texas Code of Criminal Procedure, Article 1231(b), whereupon counsel for the petitioner asserted that he had a right to question the juror in behalf of the petitioner and objected to the prospective juror being excused. The Court excused the juror without allowing counsel for the petitioner to ask any questions whatsoever.

Petitioner contends, first,

that the prospective juror expressed only general sentiments and conscientious scruples against the death penalty which fall far short of an affirmation that she would automatically vote against the death penalty; thus, excusing her was in violation of the Witherspoon rule as stated in Granviel v. Estelle, 655 F. 2nd 673 (1981) holding that a venireman may be excused for cause only if he is irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. In Granviel, ibid, as in Petitioner's case, the venireman who was excused qualified her negative answers by expressing the sentiments of not "thinking" or "feeling" they could vote to inflict the death penalty; second

Since the venireman stated that she could follow the law, could imagine circumstances in which the death penalty would be proper and could write a death penalty verdict, she represented her state of mind as to her views on capital punishment to be such, that, even though she had sentiments and doubts, she could put aside her personal feeling and follow the law; and third

In the alternative, that the venireman was prematurely excused, that counsel for petitioner had the right to question the juror to attempt to clarify her ambivalence, if any. In Burns v. Estelle, 626 F 2nd 396 (1980), the Fifth Circuit ruled that the trial Court erred in excusing veniremen for cause without allowing counsel for petitioner to question the veniremen when they expressed only general objections to the death penalty and could not take the oath as stated in Article 12.31 (b), Code of Criminal Procedure for the State of Texas.

Aside from these arguments, petitioner contends that the form of the questions asked the prospective juror precludes disqualification for the cause requested. The venireman was asked if she could "write" a verdict that would result in the

death of the petitioner. Inability of "write" the death penalty is not sufficient ground for dismissal as a prospective juror, Alderman v. Austin, 498, F. Supp. 1134 (1980), affirmed 663 F 2nd 558 (5th Circuit, 1981).

Briefly stated, petitioner contends that statements by the veniremen that she did not "feel" or "think" that she could "write" a death penalty verdict failed to express a state of mind for which she could be excused for cause without violation of Witherspoon. The venireman's statements that she could follow the law and could imagine a case in which the death penalty would be appropriate and could write a death penalty verdict expressed a state of mind which prohibits exclusion because of doubts and general objections to the death penalty, Burns v. Estelle, supra, 626 F 2nd 396, petitioner contends that venireman's ability to follow the law rehabilitates her from any and all doubts and considerations of a nature to disqualify her for cause: however, regardless of these considerations, counsel for petitioner should have been permitted to question the prospective juror regarding her ambivalence, if any, Burns v. Estelle, supra, 626 F 2nd 396.

CONCLUSION

Petitioner prays that the petition for writ of Certiorari be granted.

Respectfully submitted,

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BILLY WAYNE WHITE, Appellant

NO. 62,780 VS. - - - - - - Appeal From HARRIS County.

THE STATE OF TEXAS, Appellee

O P I N I O N

The appellant was found guilty of capital murder and placed under a judgment of death. He sets out fourteen grounds of error.

In the first ground he argues that the judgment and verdict are void because the jury heard evidence, as well as the State's opening statement, before all the jurors had taken the oath prescribed by V.A.C.C.P. Article 35.22. The venire members were examined individually on voir dire, as V.A.C.C.P. Article 35.17, Section 2, permits. The trial court administered the jury oath to each juror separately after he was accepted for the jury. This practice of separately swearing jurors in capital cases was required under former law, but it has not been required under the present Code of Criminal Procedure since December 31, 1965. See Onion, "Special Commentary," 2 Vernon's Annotated Code of Criminal Procedure of the State of Texas 624 (1966). In this case the trial court failed to administer an individual oath to the third juror who was accepted. No objection was made at that time, and the matter apparently escaped the attention of everyone.

The taking of evidence commenced with the testimony of an eyewitness. He testified that he was working across the street from the scene of the murder, that he heard a noise like a firecracker come from across the street, and that he saw a man with a gun running away from the scene. At this point the jury was retired so that the court could rule on the appellant's motion to suppress this witness's testimony of identification (a ruling which we shall consider below). The court overruled the motion, and then said:

"May we have the jury -- wait just a minute. It has been mentioned to me that I did not swear the jurors. But we swore them individually as I recall. I thought I swore all of them as each of them were selected, but probably in an abundance of precaution it might be a good idea to swear them at this time again. But I know I had it written out at the time in front of me and tried to do it.

"Do you have any independent recollection, Mr. Peavy, of any of the jurors not being sworn?

"MR. PEAVY [Defense Attorney]: As I recall, every single one of them was sworn in, the best I recall.

"MR. URQUHART [Prosecutor]: That's my recollection, Judge, that each were individually sworn.

"THE COURT: All right, bring them out, and I will.

* * *

"(Jury returns to jury box.)

"THE COURT: Ladies and gentlemen of the jury, before I proceed, let me ask you, did I swear each of you as you were selected as a juror during the past three weeks? Were there any of you that were not sworn? Do you remember?

"After the Court questioned you, after both the State and the Defendant had an opportunity to question you, it was the Court's intention at least to have each of you sworn as a juror in this case.

"Were there any of you that were not sworn? My independent recollection is that you were all sworn, but I suppose in an abundance of precaution it might be well that I ask all of you to stand and raise your right hands again, so there be no question concerning your having been sworn.

"(The jury was administered the oath by the Court.)"

The State then resumed the examination of the witness. It did not seek to re-introduce or repeat the testimony that had been given earlier.[1/]

It has been held that the complete failure to administer the proper jury oath is a reversible error that may be raised for the first time on appeal. Howard v. State, 80 Tex.Crim.

1/ Compare Woodkins v. State, 542 S.W.2d 855, 860-861 (Tex.Cr.App. 1976); Patterson v. State, 416 S.W.2d 816, 820-821 (Tex.Cr.App. 1967).

588, 192 S.W. 770 (1917). But the rule is not the same if the proper oath was given, but merely given untimely. Id. In the case of an untimely oath, as was held in Caldwell v. State, 12 Tex.Ct.App. 302, 316 (1882),

> "[t]he question presented is this: Will this court reverse a judgment for these irregularities, when the defendant made no objection at the time, taking his chance of being acquitted by this jury thus sworn, and holding in reserve this matter to be used in his motion for new trial, and, on failure then, to be used in this court as ground for reversal of the judgment? We think not."

Accord, Northcutt v. State, 154 Tex.Crim. 600, 229 S.W.2d 373 (1950).

In this case the proper jury oath was administered; the only problem was that the oath was not administered timely. This could not render the verdict void. The appellant made no objection to the procedure (and, in fact, told the court that all the jurors had been sworn individually). He may not raise this complaint for the first time on appeal.

In his second ground of error the appellant claims that two jurors were disqualified because they were not asked to "state[] under oath that the mandatory penalty of death or imprisonment for life will not affect [thei.] deliberations on any issue of fact"; V.T.C.A., Penal Code, Section 12.31(b). As we held in Smith v. State, 540 S.W.2d 693, 698 (Tex.Cr.App. 1976), cert. denied, 430 U.S. 922 (1977), Section 12.31(b) does not constitute a separate oath to be administered in its own terms to each venire member, but rather is merely one criterion of qualification. The fact that the venire members were not asked this question did not render them disqualified.

The appellant expands on this theme in his third ground of error, in which he argues that the other ten jurors, who were asked the Section 12.31(b) question, were disqualified because the record does not show that they were under oath during the voir dire. This argument was raised and rejected in Duffy v.

State, 567 S.W.2d 197, 200-201 (Tex.Cr.App.), cert. denied, 439 U.S. 991 (1978), and what we said there need not be repeated. "The Court of Criminal Appeals shall presume ... that the jury was properly impaneled and sworn ... unless such matters were made an issue in the court below, or it otherwise affirmatively appears to the contrary from the record." V.A.C.C.P. Article 44.24(a). No such issue was made below, and the contrary does not affirmatively appear.[2/] No error appears.

The fourth ground of error is that the court erred in excusing Venire Member Barbara Jean Grace. The appellant contends that Grace was not so opposed to the death penalty as to have satisfied Witherspoon v. Illinois, 391 U.S. 510 (1968). The merits of this ground were not preserved for appellate review, for no such objection was made at trial. Crawford v. State, ___ S.W.2d ___ (Tex.Cr.App., No. 57,602, July 16, 1980 ; rehearing denied, April 15, 1981), cert. denied, ___ U.S. ___, 49 U.S.L.W. 3912 (No. 80-5693, 6-8-81); Boulware v. State, 542 S.W.2d 677 (Tex.Cr.App. 1976), cert. denied, 430 U.S. 959 (1977).

The appellant next complains that the trial court erred in refusing to let him examine Venire Member Grace. The trial court began the examination of Grace, as it did that of all the venire members,[3/] by explaining the difference between murder and capital murder. The court then asked Grace if she could consider death as a penalty; she expressed some reluctance. The court pursued the matter, asking if Grace could "assume that responsibility ... and would write a death penalty?"

[2/] In fact, we notice the trial court's remark to the first twenty members of the venire, "Now let me ask you this then collectively -- and remember that you have been sworn as jurors ...."

[3/] Neither party objected to this procedure.

"A Yes, I guess I could, but --

"Q Now, see, you say you guess. Well, you're not saying that under no circumstances would you ever consider the death penalty, are you? You can imagine a far out case in which the death penalty, if the law provides it, that a person should receive it, can you not?

"A Yes, I can imagine that.

"Q And if you reach that point to where somebody gave you that type of case, the evidence was there and you felt beyond a reasonable doubt that that was a proper verdict, could you and would you write that verdict?

"A I'm going to have to say no.

"Q Well, you're the only one that knows. Can you tell us why you would not?

"A Well, it's just that even though I know that, you know, death would be the proper verdict and everything, it just seems like in my heart I wouldn't be able to do that, I just couldn't. I just don't feel that I could just say death to this person.

"Q You understand, of course, you would not be saying death. You would be writing the answers that you know would mean that the judge would be the one that would be sentencing the person to death. You understand that?

"A Uh-huh.

"Q And you would answer those questions so that the judge would not be forced to give the individual death; is that what you're saying?

"A Right. At least I would not give him death. So, therefore, I would want the judge to not give him death also.

"Q Consequently, you would make your answers so that he could not receive death as a penalty; is that right?

"A Yes, sir. Even though I know what's right, I know what you're saying, you know; but deep in my heart, I just don't feel like I could write death to a person. So, therefore, I would want the judge to consider not giving death to him.

"Q Well, Miss Grace, of course there's nobody that can find any fault with how you feel. You're the one that has to make that decision. I told you yesterday we would find no fault with you, didn't I?

"A Yes, sir.

"Q Nobody is going to find any fault. All we need to know, are you so precommitted that regardless

of how right you thought it was you would never write a verdict that would represent the death penalty?

"A Right. Now, I have to say no.

"Q When you say now, explain that.

"A No, I just could not do it. I just don't think I could.

"MR. URQUHART: I would make a motion, Your Honor. I believe that the lady is being honest with the Court.

"MR. PEAVY: I'd like to ask her just a few questions, Your Honor.

"MR. URQUHART: Regardless of what she says now, I mean the record is clear at this point.

"MR. PEAVY: Just maybe the Court could ask her if there's any conceivable situation, such as a far-out situation like a terrorist or mafia member who was threatening everybody in the courtroom -- the question is whether there is some situation that she would consider the death penalty.

"Q (By the Court) I gather from what you tell me that there are no circumstances, are there, that you would ever consider the death penalty, or am I wrong?

"A No. Huh-uh. Even if it was a terrorist or something, I would still feel that in my heart, you know, that the judge should give some other penalty besides death. I just don't feel like I could do it.

"MR. URQUHART: I renew my motion.

"MR. PEAVY: Your Honor, we object to the witness being, the juror, prospective juror, being excused unless we have the opportunity to question her a little more thoroughly.

"THE COURT: Doesn't the statute make a provision? Is the Court limited after she has --

"MR. URQUHART: That's what I'm trying to say. Whatever he can get her to say now, the record is clear at this point how she feels.

"MR. PEAVY: Your Honor, I feel that I have a right to question a juror myself on behalf of the defendant.

"THE COURT: Get me the statute. I think the statute provides that after she has committed herself that the Court has no further right to question her or that either side does. Do you have the statute there?

> "MR. URQUHART: Judge, now there may be something in the Code of Criminal Procedure. I have 1231 B: 'The judge must excuse the juror.'
>
> "THE COURT: All right. Thank you, ma'am. You will be excused. * * * "

The court erred in not granting the appellant's request to examine Grace further. Such errors are not reversible when, as here, the record shows that the venire member was questioned at length and that she unequivocally stated that she could not vote for the death penalty under any circumstances. Burns v. State, 556 S.W.2d 270, 276-278 (Tex.Cr.App.), cert. denied, 434 U.S. 935 (1977); Huffman v. State, 450 S.W.2d 858, 860 (Tex.Cr. App. 1970), death penalty vacated, 408 U.S. 936 (1972). See Ortega v. State, 462 S.W.2d 296, 303-304 (Tex.Cr.App. 1970). In this case we also note that the appellant did, in effect, pose one question to Grace. This question, about "a far-out situation like a terrorist," was the appellant's principal inquiry to other venire members who expressed reservations about the death penalty. This ground does not present reversible error.

In his sixth ground of error, the appellant complains that the trial court refused to let him ask certain questions of one venire member. The appellant asked the venire member if he would be unable to consider the penalty of confinement for life if it were proved that the defendant went into a store, "attempted to rob it or robbed it," aimed a pistol at a woman's head at short range and shot her, killing her instantly, and if the woman's husband testified to that. (This was an accurate statement of what the State's case would be.) The State's objection was sustained. The appellant eventually was permitted to ask if the venire member could return a verdict of life in prison if it were proved that a defendant shot someone in the head in the course of committing a robbery. There was no error in refusing to let the appellant ask a hypothetical question that was based on the

facts peculiar to the case on trial. 35 Tex.Jur.2d "Jury," Section 116 (1962). In fact the question that was permitted had more details than the appellant was entitled to ask. This ground has no merit.

Grounds seven, eight, and nine complain of the court's overruling seven challenges for cause. The appellant peremptorily challenged all seven venire members, so they did not become jurors. The appellant did not request additional peremptory challenges. He did not state that he was forced to accept any juror who was unacceptable to him. No reversible error appears. See, e.g., Payton v. State, 572 S.W.2d 677 (Tex.Cr.App. 1978); Hernandez v. State, 563 S.W.2d 947, 948 (Tex.Cr.App. 1978); Adami v. State, 524 S.W.2d 693, 700 (Tex.Cr.App. 1975).

The tenth ground complains of the admission of three photographs which showed the entry and exit wounds made by the fatal bullet. These photographs illustrated the medical examiner's testimony. These were not autopsy pictures. Cf. Terry v. State, 491 S.W.2d 161 (Tex.Cr.App. 1973). They were admissible. Martin v. State, 475 S.W.2d 265 (Tex.Cr.App. 1972).

The eleventh ground argues that the in-court identifications of the appellant by Alge Spinks and Mack Alford should have been suppressed because they were tainted by a suggestive show-up. See generally Kirby v. Illinois, 406 U.S. 682 (1972).

Spinks was the deceased's husband. He owned a furniture store which he and the deceased operated. On August 23, 1976, a man came to the store as the Spinkses were about to close it. He was admitted and "walked about halfway over the store," asking questions about merchandise. He selected some lamps. As the deceased went into the office to get the "ticket book," the man pulled a gun and demanded money. Spinks gave him about $250 to $260 and went into the office with the deceased, as the man ordered. The man demanded Spinks' billfold, which was surrendered. The man shot the deceased. He next ordered Spinks to lie down,

then to open the safe, then to lie down again; Spinks obeyed. The man then asked if the deceased had watches and rings; as he lifted the deceased's arm, he dropped his gun. Spinks grabbed it, and the men "scuffled." As they fought for control of the gun, Spinks fired it twice. Then he managed to get up, run out of the store, and call to Alford who was across the street. Spinks saw the man running around the corner. He had been in the store four or five minutes.

Alford saw a man run from the store and around a building. He got a good look at the man, who was black, wearing a red cap, carrying a nickel-plated gun, and "kind of hopping with one leg." Alford heard Spinks call for help. He flagged down a police car, and the officers broadcast a description of the man.

Officer Nieto responded to the call. He saw a black man, wearing a red cap, walking at a fast pace about two and a half blocks from the store. Nieto told the man to stop and raise his hands. The man did so, revealing a pistol in his waistband. Nieto arrested the man, who was the appellant. The appellant had been shot in the groin area. He had $269.62 in his pants pocket. One of the bullets found at the scene was identified as having been fired from the appellant's gun.

The appellant was taken to the furniture store within fifteen or twenty minutes after the offense. Spinks and Alford were told that someone had been arrested and were asked to look at him to see if he was the man. They each looked at the appellant, who was seated in the back of the police car, not wearing a hat. Each said that the appellant was the man. They denied that the police made any suggestive comments and they were positive in their in-court identifications. We conclude from the totality of the circumstances that their identifications were not tainted and that their testimony was admissible.

In the twelfth ground of error the appellant argues that Section 12.31(a) of the Penal Code denies due process by failing

to provide a reasonable alternative to the death penalty. He says that jurors' knowledge of the possibility of parole being granted if a defendant is given life makes it almost a certainty that they will vote for death. (There is no contention that the jurors discussed parole in this case.). He says that a punishment of confinement for life without parole would be a more reasonable alternative.

In a capital trial, as in any other trial, the matter of parole is not a proper consideration for the jury's deliberations on punishment. O'Bryan v. State, 591 S.W.2d 464, 478 (Tex.Cr. App. 1979), cert. denied, 446 U.S. 988 (1980). See Freeman v. State, 556 U.S. 287, 304 (Tex.Cr.App. 1977), cert. denied, 434 U.S. 1088 (1978). Yet it is common knowledge that from time to time inmates of the Department of Corrections are released on parole, and the mere mention of that fact is not a denial of a fair and impartial trial on the issue of punishment. Heredia v. State, 528 S.W.2d 847, 852 (Tex.Cr.App. 1975). This being so, the jurors' mere possession of this common knowledge, without even mentioning it during their deliberations, would not constitute a denial of due process. Whatever merit another punishment might have, the choice of punishments is for the Legislature so long as it is not contrary to the provisions of the Constitution. Dendy v. Wilson, 142 Tex. 460, 179 S.W.2d 269, 273 (1944). See Ex parte Granviel, 561 S.W.2d 503, 515 (Tex.Cr.App. 1978). We find no constitutional violation here.

The thirteenth ground is, 'Capital punishment is cruel and unusual punishment, per se." This contention always has been rejected by the United States Supreme Court and this Court.

The fourteenth ground states, "The appellant expects to develop new evidence to present that he was incompetant [sic] to stand trial at the time of his trial ...." This ground presents nothing for us to review.

The judgment is affirmed.

Roberts, Judge

DELIVERED: September 23, 1981
EN BANC

BILLY WAYNE WHITE, Appellant

NO. 62,780 v. - - - Appeal from HARRIS County

THE STATE OF TEXAS, Appellee

CONCURRING OPINION

My views about continued application of the contemporaneous objection rule judicially crafted by the Court in Boulware v. State, 542 S.W.2d 677 (Tex.Cr.App. 1976), cert. denied, 430 U.S. 959 (1977) - after at least four years of entertaining Witherspoon[1] challenges to exclusion of prospective jurors without requiring an objection be voiced[2] - have been recently expressed in Ferguson v. State, 617 S.W.2d 925 (Tex.Cr.App. 1981). Without reiterating them, it is enough to observe that the Boulware Court seems to have been overly influenced by the pronouncements of the Supreme Court of the United States with respect to provisions of the federal rule of criminal procedure and federal habeas corpus consideration of claimed deprivation of constitutional rights during the course of a state criminal prosecution. See Boulware, at 679-681. So I disagree with the declaration of the Court in the

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[1] Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

[2] Indeed, defense counsel in Tezeno v. State, 484 S.W.2d 374, 382-383 (Tex.Cr.App. 1972) expressly stated, "No objection," when the State challenged for cause; the Court still reasoned that such "waiver of objection apparently will not, in itself vitiate an improper challenge," but is a factor to be considered when the meaning of a response by a venireman is uncertain, id., at 383, n. 2. There was not a contemporaneous objection in Hovila v. State, 532 S.W.2d 293 (Tex.Cr.App. 1975), still the Court, without even mentioning the possibility of waiver, examined the voir dire and held that several veniremember were improperly excused under Witherspoon. Accordingly, observing that "a contemporaneous objection rule. . . apparently did not even exist" at the time Kenneth Granviel was tried in October 1975, the Fifth Circuit has just now vacated the death sentence imposed on him. Granviel v. Estelle, ____ F.2d ____ (CA 5 1981, No. 79-1332, delivered September 11, 1981).

case at bar that ground of error four was not preserved for review "for no such [Witherspoon] objection was made at trial."

Further, in reading portions of the voir dire examination of veniremember Grace quoted in the majority opinion to address the fifth ground of error, it seems to me that the objection that was made after the prosecutor renewed his motion [3] came in a contexual setting that the point of counsel's objection was clearly understood by all concerned. See Zillender v. State, 557 S.W.2d 515 (Tex.Cr.App. 1977). [4] They were then and there in the throes of examining the veniremember for purposes of Witherspoon when matters reached the point that prompted the prosecution to "make a motion" - a motion whose grounds and desired relief were not stated but whose thrust was patently directed toward excusal of Grace as a prospective juror on account of her scruples regarding imposition of the death penalty. Resisting the motion thus understood, appellant's lawyer sought to question Grace "a little more thoroughly," and that brought the colloquy in which the trial judge opined that "the statute provides that after she has committed herself" further questions were barred - meaning most assuredly questions about whether she would automatically vote against imposition of capital punishment. And then, only after

---

[3] ". . . we object to the prospective juror being excused unless we have the opportunity to question her a little more thoroughly." Interestingly the Court finds error in not granting the request, but also holds the error is not reversible because Grace "unequivocally stated that she would not vote for the death penalty under any circumstances."

[4] "Thus, where the correct ground of exclusion was obvious to the judge and opposing counsel, no waiver results from a general or imprecise objection," 557 S.W.2d, at 517.

the statement concerning Section 12.31(b) of the Penal Code, did the trial court excuse the veniremember.

Accordingly, satisfied that all understood exactly the import and impact of the stated objection of appellant, I would not refuse to review the merits of ground of error four. Nevertheless, I agree with the assessment of the Court that the record shows that Grace made "unmistakably clear" a determination that "there are no circumstances. . . that [she] would ever consider the death penalty."[5/]

Therefore, except as noted, I join in the opinion and concur in the judgment of the Court.

CLINTON, Judge

(Delivered September 23, 1981)

EN BANC

Teague, J., joins

[5/] I emphasize that "the record shows" her determination as finally stated to the trial judge. Up to that point she appears to have equivocated somewhat, particularly if what she actually said in one response to whether she would never write a death penalty verdict was "Right now, I have to say no," rather than, as the reporter transcribed it, "Right. Now, I have to say no." This exchange demonstrates the utmost importance of accurate reporting which, of course, one must assume was done here.

on the 17th. If we're doing our business, wait outside until we take you to the jury room.

BARBARA JEAN GRACE,

a prospective juror, took the witness stand, and the following proceedings were had, viz:

EXAMINATION

BY THE COURT:

Q You are Barbara Jean Grace?

A Yes, sir.

Q All right. Mrs. Grace, there's no need to be uptight. I'm sure that you are not in court every day like Mr. Urquhart and the rest of us are all the time, but nobody is going to do any fussing. All we want to do is ask you several questions to help everybody determine whether or not you can be a fair, impartial juror.

You understand that this is a criminal case and both the State and the defendant alike are entitled to a fair trial? You understand that?

A Yes, sir.

Q The reason I'm talking loud is to encourage you to talk loud. I don't have to talk this loud, but I'm encouraging you to do it because it's necessary that the attorneys hear you and as well

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as for the court reporter to take it down.

Do you understand that you have to answer out?

A (Nodding head affirmatively.)

Q And you can't shake your head. If you shake your head, she doesn't have a key there that says, "She shook her head." She has a key that says yes or no or whatever your answer is. Do you understand?

A Yes, sir.

Q That's better. If we ask something that you don't understand, don't hesitate to tell us that you don't understand. If we use terminology, language that you don't understand, it's nothing to be ashamed of, because lawyers are trained in a different language entirely than the average lay person is; and lots of times we talk in that language and other people don't. So, you wouldn't be the first one today, tomorrow, or last week that didn't understand what we're saying.

So, don't answer a question if you don't understand it. Will you do that?

A Yes, sir.

Q And if you want us to -- sometimes we ask a question and a person wants us to reframe it in some other language. So, don't have any hesitancy to

talk back at us, will you?

A Yes.

Q That's going to be awful hard for you to do, isn't it?

A Yes.

Q Are you really that scared?

A Yes.

Q I'm trying to make it as easy for you, and if I don't, you tell me, because that's my job, not to make it hard but easy for you. Of course, I don't think on any jury case it's ever easy, but it's a job that somebody has to do.

In this case, you're down here today as one of the panel members of which we're trying to select a jury. And in this case the defendant is charged with the offense of capital murder.

Texas has what is known as murder and capital murder. Murder carries with it a penalty of not less than 5 years or more than 99 or life. Do you understand the penalties for murder?

A Yes.

Q All right. And capital murder carries with it a penalty not that broad. See, that's the Legislature's understanding that there can be some murders that are not as bad as others; so, they

said you could find a person guilty of murder and give him as little as five years; or if it was a horrible murder, you could give him as much as life or 99 years. There's a wide range of punishment in there, isn't there?

A Yes.

Q All right. Now, then, there is another type of murder, and that is what we call capital murder. Capital murder, there are only two penalties that can be assessed, life imprisonment or death. I suppose maybe there's a wide range of punishment there. I suppose it's a wide range between 99 years and death, but that's the only -- see, you have an awful latitude in just murder.

Now, murder is the intentional killing of a person, taking of a human life. Do you understand?

A Yes.

Q Capital murder is that same intentional taking of a human life, plus it's committed while you are doing something else; and in this case, they have alleged that it was in the commission of a robbery. So, do you see the difference between murder and capital murder?

A Yes.

Q Now, what I need to -- I've explained to you that in the event that you find the defendant guilty of capital murder, the penalty may be life in the Texas Department of Corrections, penitentiary, or death by injection.

Now, do you have any reason, by virtue of your bringing up, your religious background, your personal beliefs, whatever it may be -- there are people who come in and tell the Court that they, by training, environment, society, that they grew up in one thing and another, that they don't believe they should sit as jurors. There's others that don't believe in capital punishment and they would not and could not ever consider, in a proper case where they thought -- even though the law provides that you can do it and even though the law makes it one of the punishments that can be given -- they just never would do it.

Now, do you know of any reason, if you were selected as a juror and you thought that it was right in a proper case, could you write a verdict of death?

See, we're not asking you about any particular case. We're not asking you about this

case. We're just asking you -- you understand the law now, don't you?

A Right.

Q You understand that if you found, after listening to all of the evidence, that a person was guilty beyond a reasonable doubt of all of the elements that constituted capital murder, is there anything that would keep you, if you thought that it was proper, that would keep you from writing a verdict, finding an individual guilty and assessing the death penalty?

A No, I don't think so. I don't have any specific reasons right now.

Q I didn't hear you.

A I can't think of any right now.

Q See, what's going to happen, we've already got two jurors on this case selected, and we have to go through the group that's out there. Some of them have been excused, and some of them have been accepted. And when we get 12, those 12 will listen to the evidence. They will determine in their own minds from the evidence that's introduced here whether or not the defendant is guilty beyond a reasonable doubt. Then they will have the opportunity of finding him guilty of capital

murder, just plain murder, or may find him not guilty. Do you understand?

A Yes, sir.

Q Then if you find the defendant not guilty, that winds it up. He leaves. He's through. If a person is not guilty, he's not guilty, and that ends it. But if you find that he's guilty, it's going to be incumbent upon you, it's going to be necessary for you to assess the penalty.

Now, can you, after hearing all the evidence and you found the defendant guilty of capital murder, can you consider, in a proper case, death as a proper penalty?

A Well, I guess I could, but I don't know if I would want to make that decision or not. After listening to everything, I suppose I could arrive at this decision, but I just don't know if I would want to be the one to say, you know, that he is to have death.

Q You understand, of course, our legal system provides that every defendant has a right, that's charged with a crime, has a right to have a trial? He has a right to have a trial by a jury. He has a right to have that jury consist of his peers, the people in the community he lives

in. But he likewise has a right, as does the State, to have a jury of people from the community of his peers who can listen to the law and can follow the law.

There's nothing wrong if you believe that it's a bad law and you say you wouldn't follow it anyway. Nobody can fuss at you about that if you tell us now. But we need to know before you get on the jury that you can take into consideration the law and take into consideration the punishment that may or may not, and consider all of it in arriving at a verdict.

How do you feel about the death penalty?

A Well, I never really thought about it.

Q Well, you've reached a point where you have to think about it.

A I just don't think I want to give anybody death. I don't think I could.

Q Well, let me ask you this: I don't think anybody wants to, but if you listen to the evidence, if you listen to the testimony and you thought that after listening to the law and after listening to the testimony and the evidence that it was a right and proper verdict, could you and would you add

your name to the list of 12 jurors that would have to sign a guilty verdict and assess the death penalty; or do you feel so strongly that no matter what the evidence was that you would not under any circumstances, even though you thought the person ought to receive the death penalty --

A (Shaking head negatively.)

Q Are you shaking your head? I don't know what you mean.

A I still don't think I would want to sign my name to it.

Q Well, it's not so much a question of whether we would want to. If you heard all the testimony and if you found the defendant guilty of capital murder, all the jurors agree that he was guilty of capital murder, then you heard additional testimony and you were asked two questions and you knew that if you answered both of those questions yes and although you knew the proper answer to both of these questions would be yes, yet you knew that by saying yes to both of these questions you knew that the defendant would get death by virtue of injection -- you know we use injection now instead of the electric chair -- and you knew

that you answered both of these questions yes and you knew he was going to die by injection, yet you knew on the other side if you answered no to both of them or one of them that that would save him from dying and would give him life, would you write yes or no?

Do you understand my question?

A I understand your question. You want to know if I knew the law and if I knew the answers to the questions would I or would I not, you know, agree with the answers.

Q Let's see if I can reframe it just a little bit. You see, you have a problem because you never have heretofore thought about being on a jury, have you?

A No, sir, I sure haven't.

Q You never have thought before that you might be called on a case or you might be asked to determine the guilt or innocence of an individual.

A No, I haven't.

Q And particularly, if you found that that person was guilty and you then had to determine whether he had to go to the penitentiary for life or whether he would suffer death, have you?

A No, sir, I have not.

Q Well, you see, you recognize that everybody is entitled to a fair trial, don't you?
A Yes, I do.
Q And of course, when we say everybody, we're talking about the State, who is prosecuting the case, as well as the defendant, who is on trial. You understand that?
A Yes.
Q And so, until you can determine in your own mind how you feel -- see, I can't look in your heart. I can't look in your mind. I can look you in the eye, but it doesn't tell me anything. It tells me that you're frightened, that you are scared, and you don't have any reason to be from that standpoint. But you need to think. How do you feel about the death penalty?
A Well, I guess I'd have to go along with it if --
Q If you found a defendant guilty?
A If it's the law, I guess I'd have to go along with it.
Q You feel that you could shoulder your responsibility?
A Yes, I feel that I could; but it would still be a hard decision even at that time, you know.
Q Unfortunately, this record is going to reflect

that I've asked you a long drawn-out question. It won't reflect that we've waited several minutes and then got no answer. It will show then that I just continued to talk, and it will look like I've been talking to you the last 30 minutes when in truth this is not true.

You have to know -- do you feel, are you telling us that you feel that in your mind and in your heart, whatever makes you function, that if you felt and found the defendant guilty of capital murder and you knew that the judge would have to give him death for that offense if you answered the two questions that the Court would propound to you, if you knew by your answers that answering it yes he would receive death but by answering one of them no or both of them no that he would only get life, could you assume that responsibility if you thought that it was proper and would write a death penalty?

A Yes, I guess I could, but --

Q Now, see, you say you guess. Well, you're not saying that under no circumstances would you ever consider the death penalty, are you? You can imagine a far out case in which the death penalty, if the law provides it, that a person

should receive it, can you not?

A Yes, I can imagine that.

Q And if you reach that point to where somebody gave you that type of case, the evidence was there and you felt beyond a reasonable doubt that that was a proper verdict, could you and would you write that verdict?

A I'm going to have to say no.

Q Well, you're the only one that knows. Can you tell us why you would not?

A Well, it's just that even though I know that, you know, death would be the proper verdict and everything, it just seems like in my heart I wouldn't be able to do that, I just couldn't. I just don't feel that I could just say death to this person.

Q You understand, of course, you would not be saying death. You would be writing the answers that you know would mean that the judge would be the one that would be sentencing the person to death. You understand that?

A Uh-huh.

Q And you would answer those questions so that the judge would not be forced to give the individual death; is that what you're saying?

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A Right. At least I would not give him death. So, therefore, I would want the judge to not give him death also.

Q Consequently, you would make your answers so that he could not receive death as a penalty; is that right?

A Yes, sir. Even though I know what's right, I know what you're saying, you know; but deep in my heart, I just don't feel like I could write death to a person. So, therefore, I would want the judge to consider not giving death to him.

Q Well, Miss Grace, of course there's nobody that can find any fault with how you feel. You're the one that has to make that decision. I told you yesterday we would find no fault with you, didn't I?

A Yes, sir.

Q Nobody is going to find any fault. All we need to know, are you so precommitted that regardless of how right you thought it was you would never write a verdict that would represent the death penalty?

A Right. Now, I have to say no.

Q When you say no, explain that.

A No, I just could not do it. I just don't think I

could.

MR. URQUHART: I would make a motion, Your Honor. I believe that the lady is being honest with the Court.

MR. PEAVY: I'd like to ask her just a few questions, Your Honor.

MR. URQUHART: Regardless of what she says now, I mean the record is clear at this point.

MR. PEAVY: Just maybe the Court could ask her if there's any conceivable situation, such as a far-out situation like a terrorist or mafia member who was threatening everybody in the courtroom -- the question is whether there is some situation that she would consider the death penalty.

Q (By the Court) I gather from what you tell me that there are no circumstances, are there, that you would ever consider the death penalty, or am I wrong?

A No. Huh-uh. Even if it was a terrorist or something, I would still feel that in my heart, you know, that the judge should give some other penalty besides death. I just don't feel like I could do it.

MR. URQUHART: I renew my motion.

MR. PEAVY: Your Honor, we object to the witness being, the juror, prospective juror, being excused unless we have the opportunity to question her a little more thoroughly.

THE COURT: Doesn't the statute make a provision? Is the Court limited after she has

MR. URQUHART: That's what I'm trying to say. Whatever he can get her to say now, the record is clear at this point how she feels.

MR. PEAVY: Your Honor, I feel that I have a right to question a juror myself on behalf of the defendant.

THE COURT: Get me the statute. I think the statute provides that after she has committed herself that the Court has no further right to question her or that either side does. Do you have the statute there?

MR. URQUHART: Judge, now there may be something in the Code of Criminal Procedure. I have 1231 B: "The judge must excuse the juror."

THE COURT: All right. Thank you, ma'am. You will be excused. You don't have to apologize as long as you're answering truthfully here. That's all that counts.

MISS GRACE: Yes, sir.

THE COURT: All right. You may be excused.

MR. PLATTEN: Thank you, Miss Grace.

THE COURT: All right. Give me the next juror, please, sir.

PATRICK RICHARD McKEE,

a prospective juror, took the witness stand, and the following proceedings were had, viz:

EXAMINATION

BY THE COURT:

Q How do you do, sir?

A Hello.

Q You are Patrick Richard McKee?

A Yes, sir.

Q Mr. McKee, you were here yesterday, and at that time we generally qualified you as a panelist from which it is our desire to select 12 jurors in the case of the State of Texas versus Billy Wayne White. I think at that time we mentioned to you that the defendant in this case and the trial of this case will be a trial that the indictment alleges what is known as capital murder. In Texas we have the distinction between what we call -- it's a poor choice of words --

81-6156

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. _____

BILLY WAYNE WHITE

Petitioner

Versus

THE STATE OF TEXAS

Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner prays for permission to proceed in forma pauperis for the following facts and reasons:

Petitioner is a pauper, indigent and too poor to employ counsel or pay for any part of his appeal or application for writ of certiorari.

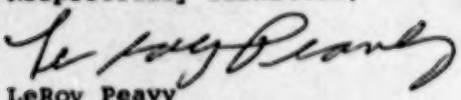
The undersigned attorney has been appointed and assigned by the trial court to represent petitioner on appeal and any matters pertaining thereto.

Petitioner has filed a pauper's oath with the trial court and a transcript has been furnished to the Court of Criminal Appeals at no expense to petitioner.

The undersigned attorney is in the process of obtaining a pauper's oath or oath of indigency from petitioner for filing in this Court in conjunction with petitioner's application for leave to proceed in forma pauperis.

WHEREFORE PREMISES CONSIDERED, petitioner prays that he be granted leave to proceed in forma pauperis.

Respectfully submitted,



LeRoy Peavy
Attorney for Petitioner
608 Fannin, Suite 705
Houston, Texas 77002
Tel. (713)224-8427
Texas Bar Number: 15699000

AFFIDAVIT

I, LeRoy Peavy, attorney for Billy Wayne White, hereby state that Billy Wayne White is a pauper, an indigent person and is too poor to pay for an appeal of his conviction for capital murder or pay for any part thereof.

Signed at Houston, Texas, this 1st day of February, 1982.

LeRoy Peavy

State of Texas

County of Harris

Before me, the undersigned Notary Public, on this day personally appeared LeRoy Peavy, who being by me duly sworn on his oath deposed and said that the matters and facts stated herein are true and correct, so help me God.

LeRoy Peavy

SUBSCRIBED AND SWORN TO BEFORE ME on the 1st day of February, 1982, to certify which witness my hand and official seal.

NOTARY PUBLIC
STATE OF TEXAS

Notary Public in and for the County of Harris, State of Texas

My Commission expires: _____

BEVERLY BAMMEL
Notary Public in Harris County, Texas
My Commission Expires 10-5-85

NO. 81-6156

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1981

RECEIVED
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SUPREME COURT, U.S.

BILLY WAYNE WHITE,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

I. SHOULD THIS COURT CONSIDER A MATTER TO WHICH THE STATE APPELLATE COURT FOUND PETITIONER HAD MADE A PROCEDURAL DEFAULT UNDER STATE LAW?

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NO. 81-6156

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1981

BILLY WAYNE WHITE,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES The State of Texas, Respondent herein, by and through its attorney, the Attorney General of Texas, and in response to Petitioner's Writ of Certiorari files this its Brief in Opposition:

OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas, delivered September 23, 1981, White v. State, ____S.W.2d____ (Tex.Crim.App. 1981) is attached to the petition as Appendix A.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES

Petitioner basis his claims upon the Sixth, Eight and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

On August 23, 1976, as Alge and Martha Spinks were closing their furniture store in Harris County for the evening, Petitioner entered the premises and asked to make purchases. Mrs. Spinks returned to the office area of the store to prepare a receipt for Petitioner's purchase, at which time Petitioner pulled out a gun and demanded money. Mr. Spinks gave Petitioner the receipts of the day, whereupon Petitioner shot Mrs. Spinks in the face and forced Mr. Spinks to lie on the floor. Mrs. Spinks died instantly as a result of the close-range gunshot wound to the face.

As Petitioner was attempting to remove jewelry from Mrs. Spinks' body, he dropped the gun and a struggle between Petitioner and Mr. Spinks ensued. Petitioner subsequently was apprehended fleeing from the furniture store.

On October 25, 1977, Petitioner was found guilty of the capital offense. On that same date, the jury answered affirmatively the special issues submitted pursuant to Article 37.071, V.A.C.C.P. Accordingly, punishment was assessed at death.

SUMMARY OF THE ARGUMENT

This Court should refuse to consider a matter to which Petitioner made a procedural default under state law. At the time of Petitioner's trial, state procedural law required that a contemporaneous objection be made at trial to the alleged improper exclusion of a venireman. Since Petitioner failed to object as required by state law, the appellate court found that Petitioner had waived review of this claim. Because the state has a legitimate interest in the enforcement of its contemporaneous objection rule, this Court should refuse to consider the claim.

Even were review of this ground not precluded, Petitioner's contention that a venireman was excluded in violation of Witherspoon v. Illinois, is meritless. The record as a whole reflects that this venireman maintained that she could not vote for the imposition of the death penalty under any circumstances.

REASONS FOR DENYING THE WRIT

I.

THE QUESTION PRESENTED FOR REVIEW IS UNWORTHY OF THIS COURT'S ATTENTION

Rule 17 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right but of judicial discretion, and will be granted only when there are special and important reasons therefor. Petitioner has advanced no special or important reason in this case and none exists.

II.

THIS COURT SHOULD REFUSE TO CONSIDER A MATTER TO WHICH THE STATE APPELLATE COURT FOUND PETITIONER HAD MADE A PROCEDURAL DEFAULT UNDER STATE LAW.

Petitioner contends that venireman Barbara Jean Grace was excluded for cause in violation of the doctrine of Witherspoon v. Illinois, 391 U.S. 510 (1968). When this contention was presented to the state appellate court, that court held that Petitioner had waived review of this ground, as he failed to make a contemporaneous objection on that ground at trial as was required by state procedural law in effect at the time of Petitioner's trial. See, Boulware v. State, 542 S.W.2d 677 (Tex.Crim.App. 1976) cert. denied, 430 U.S. 959 (1977).

This Court consistently has declined to review matters to which no proper objection was made at trial in compliance with state procedural requirements. The failure of a defendant to present a federal question in conformance with state procedure constitutes an adequate and independent ground of decision barring review in this Court. Michigan v. Tyler, 436 U.S. 499 n.7 (1978). That the state has a legitimate

interest in requiring the parties to apprise the trial court of their grounds for complaint is well settled. See, e.g., Wainwright v. Sykes, 433 U.S. 72 (1977); Estelle v. Williams, 425 U.S. 501 (1976); Davis v. United States, 411 U.S. 233 (1973). The state's legitimate interest in this procedural rule is evident in the instant case where, if Petitioner believed that the doctrine of Witherspoon was violated, he should have apprised the trial court, giving that court an opportunity to remedy any defect before the completion of the entire voir dire and trial on the merits. Having failed to do so, review of this ground is precluded.

Nevertheless, even if review were not precluded, an examination of the entire record of this venireman's voir dire examination reveals that, after some equivocation, Grace unequivocally maintained that she could not vote for the imposition of the death penalty under any circumstances, and that, without regard to the evidence, she would answer the statutory special issues in such a way as to insure that the death penalty could not be imposed (SF 353-368). As such, her exclusion did not violate the doctrine of Witherspoon.

CONCLUSION

For the reasons discussed above, Respondent respectfully requests that the petition for certiorari be denied.

Respectfully submitted,

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